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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 729

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

RED RIVER COTTON OIL COMPANY, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Texas and Pacific Railway Company, a railway corporation chartered under an Act of Congress of the United States and engaged as a common carrier in interstate commerce, respectfully shows:

That this is a petition for a writ of certiorari to review a judgment and opinion rendered by the Supreme Court of the State of Louisiana on the 9th day of December, 1949 (R. 21) which became final upon the denial by that Court of an application for rehearing on January 9, 1950 (R. 32). Said Court is the highest Court of the State and is the State

Court of last resort and no further recourse is available to petitioner in the State Courts of Louisiana. A stay of mandate has been granted by the Chief Justice of the Louisiana Supreme Court to allow the filing of this application by petitioner (R. 33, 34).

Nature of the Case

This action originated in the State District Court of the Parish of Rapides, State of Louisiana on petition of the Red River Cotton Oil Company and others to recover from the Texas and Pacific Railway Company, defendant therein, the sum of $31,573.08, being the value of four cars of copra that were destroyed by fire at Alexandria, Loiusiana in February, 1947 (R. 2).

There is no dispute as to pertinent facts. The copra had been purchased in the Philippine Islands and was shipped from there by steamer to New Orleans and from the latter point was consigned by rail to the Oil Company in Alexandria. The cars were received and delivered to the consignee at its plant on February 9, 1947 and under instructions from the Oil Company's employees they were spotted inside its grounds near one of its warehouses (R. 74-76). This warehouse was on private ground owned in fee by the Oil Company or held by it under a lease (R. 52-55). The plant was enclosed by a wire fence (R. 46). The only means of access the train crew had to the premises was through a gate built by the Oil Company across the track (R. 53). This gate was kept locked by said Company and could only be opened by its employees who kept the keys in their possession (R. 46, 75).

Upon the occasion in question the switching crew brought the cars of copra to the gate, the engineer blew the whistle so that the gate could be opened, the Oil Company's employees unlocked the gate and admitted the engine and the

four cars (R. 75). They were first placed on scales under direction of the Oil Company employees and were weighed, scale tickets being issued, they were then moved under direction of the Oil Company employees to a warehouse for unloading. All of this was in accordance with the custom prevailing between the parties over a period of years (R. 51, 62-64, 74-75).

After delivering the cars at the point designated by the consignee's employees the switch engine of the Railway Company was detached from the cars and left the grounds of the Oil Company. The gate or entrance was then locked by the Oil Company's employees. On Monday morning, February 10th at about 3:50 A. M., some eighteen hours after the delivery of the shipment as set forth above, the cars of copra were destroyed by a fire which admittedly started in the warehouse of the Oil Company (R. 5, 82). The plant had been in operation for some ten hours (R. 41). The gate was locked at the time of the fire (R. 72).

The spur track on which the cars were located at the time of the fire was not only inside the private premises of the Oil Company but, in addition, was for the private and exclusive use of the Oil Company. No one else was authorzied to use the track, and the reason for putting a fence around it with a gate which was kept locked was to prevent the public from having access to it (R. 53, 54). The agreement for the use of the track by the Oil Company was made many years ago with the Houston and Central Railroad which was later succeeded by the Missouri-Pacific (R. 54). The defendant, Texas and Pacific Railway Company, had no rights of ownership in the spur track, but merely delivered shipments over it to the plaintiff's plant at the latter's request.

The consignee had 72 hours in which to unload the shipment before demurrage would begin to accrue under applicable tariffs. The fire occurred within 24 hours after deliv-

ery. Plaintiffs contend that the defendant Railway Company at the time of the fire had not completed its obligation as a common carrier, regardless of the delivery and acceptance of the shipment by the consignee, and regardless of the origin and cause of the fire. It is their contention that the Railway Company was still liable as an insurer under the bill of lading because the free time had not elapsed before demurrage might be charged the consignee. The plaintiffs also contend that the Supreme Court of the United States has decided this question in their favor in the case of *Michigan Central Railway Company* v. *Mark Owen,* 256 U. S. 427, 65 L. Ed. 1032 (1921).

The defendant Railway Company denies liability asserting that its obligation under the contract of carriage ceased when the cars were delivered to and accepted by the Oil Company at its plant according to custom; that possession and custody of the shipment were complete in the Oil Company at the time of the fire and that the carrier no longer had any access to or control over the cars; that the shipment was destroyed admittedly by fire which originated in the warehouse of the Oil Company and that the loss could not have resulted remotely from any act either of omission or commission by the carrier; that the Railway Company had completed its obligation as carrier at the time of the fire; that it no longer had access to the shipment and had no means of preventing its destruction; that it had done all it was required to do under the contract of affreightment and had complied with all of its obligations and duties as a carrier. Those defenses are set forth in its answer (R. 6).

Statement of Jurisdiction

The jurisdiction of this Honorable Court to review the questions herein presented is invoked under Section 1257

of the Judicial Code of the United States and under Rule 38 Section 5(a) of the Supreme Court of the United States which authorizes certiorari where a State Court has decided a Federal question of substance not heretofore determined by this Court or has decided it in a way that is erroneous and not in accord with the applicable decisions of this Court.

At this point may we invite attention to the fact that the Supreme Court of the United States took jurisdiction of this type of case when it granted a writ of certiorari to the Supreme Court of the State of Illinois in *Michigan Central Railroad Company* v. *Mark Owen & Company,* 256 U. S. 427; 65 L. Ed. 1032. A phase of the question there presented is involved here. The Trial Judge gave a decree in favor of the plaintiffs in the present suit, basing his opinion mainly on the *Michigan Central* case (R. 14-15). The Supreme Court of Louisiana affirmed the decision of the lower Court upon substantially the same grounds (R. 23). If the State Courts of Louisiana gave an erroneous interpretation to the *Michigan Central* case, or extended its application beyond accepted principles of the common law, or otherwise incorrectly held it applicable to certain facts, then this application for certiorari should be granted.

In addition there is drawn in question here the meaning of terms and conditions in the uniform bill of lading prescribed by the Interstate Commerce Commission covering shipments in interstate commerce. The Commission in prescribing the form of bill of lading involved acted under the authority conferred on it by Sections 1(6) of the Interstate Commerce Act (Act of February 4, 1887; 24 Stat. 379) and amendments thereto.

There is also involved in this litigation an interpretation of the proceedings and rulings of the Interstate Commerce Commission in adopting the form of bill of lading used covering this interstate shipment (52 I.C.C. 671 et seq.).

Finally there is presented for determination in connection with the foregoing the extent of liability of a common carrier in interstate commerce for goods destroyed after completion of delivery.

Assignment of Errors in State Court

Proper assignment of errors was urged in the State Courts. On appeal to the Supreme Court of Louisiana from the decision of the Trial Court the Texas and Pacific Railway Company filed an assignment of errors pointing out that the Trial Court had erroneously interpreted the bill of lading, had erroneously decided that the *Michigan Central* case was controlling and decisive of the issues in the present suit, and had erroneously held the Railway Company liable as a carrier at the time of the fire inasmuch as it had completed the contract of carriage by delivering the shipment to the premises of the consignee, who there accepted it and took exclusive possession, custody and control of the cars (R. 20).

The Supreme Court of Louisiana affirmed the judgment of the Trial Court with Justice Hamiter dissenting (R. 28). An application for rehearing was filed in which the Railway Company urged that the Supreme Court had erred in its interpretation of the bill of lading; that it had erred in its interpretation of the rules of the Interstate Commerce Commission; that it had erred in its interpretation of the decision rendered by the Supreme Court of the United States in the *Michigan Central* case; that it had erred in failing to recognize the established common law rule terminating the carrier's liability under similar circumstances as shown by decision in other states (R. 30). The rehearing was denied in a per curiam opinion with Justice Hamiter again dissenting (R. 32, 33).

Specification of Errors

It is respectfully urged that the decision of the Supreme Court of Louisiana is erroneous in the following respects:

1. In holding that the *Michigan Central* case is controlling and decisive of the issues here.

2. In failing to apply the principles of the common law relative to termination of the carrier's liability according to the jurisprudence of common law states.

3. In failing to properly interpret the bill of lading, and the rules of the Interstate Commerce Commission, by concluding that no delivery had been made because the copra was still in the cars of the railroad company, and in holding that under the bill of lading the railroad still occupied the position of an insurer of the shipment because the free time for unloading had not elapsed.

4. In holding that Texas and Pacific Railway Company was still liable as a carrier at the time of the fire although it had completed the contract of carriage by delivering the shipment to the premises of the consignee who there accepted and took exclusive possession, custody and control of it.

Questions Presented

The questions presented to this Honorable Court are these:

1. Is the decision of the Supreme Court of the United States in the case of *Michigan Central Railway Company* v. *Mark Owen,* 256 U. S. 427, controlling here and does it mean that a carrier should be held liable as an insurer during the free time for unloading regardless of possession and control of the shipment?

2. Does the common law liability of a carrier as an insurer of goods entrusted to its care continue beyond the time when it has completed the contract of carriage by releasing possession of the shipment to the consignee who accepts it and takes complete custody and

control of it on a private siding to which the carrier has no access?

3. Is there anything in the bill of lading or the pronouncements of the Interstate Commerce Commission on the subject which requires the Court to hold the Railway Company liable as an insurer under the admitted facts in this case?

Reasons Relied On for Allowance of the Writ

It is respectfully urged that the questions submitted here are of very great importance and that this Court should definitely determine the liability of carriers in a case of this kind. Until the question is finally settled by a decision of this Court under circumstances such as those outlined above, many claims will arise out of the thousands of bills of lading which carriers are issuing daily, and the present uncertainty will not only cause confusion but will result in a great deal of litigation. The interests of the carriers, the shippers and the general public would seem to require a correct and definite pronouncement of this Court on this subject.

We believe this case to be of public importance. Originally that belief was based on our experience. Searching for the facts, we caused inquiry to be made of the Association of American Railroads, which brought this response: "There are no figures such as T. & P. asked for, but best estimate of Car Service Division and Traffic Department A. A. R. is that ninety to ninety-five percent of carload traffic originates or terminates on private sidings, balance team tracks."

Petitioner urges that a writ should be allowed because the *Michigan Central* case is not controlling here and it was error for the Louisiana Supreme Court to so hold. That case can be readily distinguished from the one at bar, as will be pointed out fully in petitioner's supporting brief annexed hereto.

Certiorari should be allowed because the State Court has failed to follow the established jurisprudence under the common law governing the termination of a carrier's liability after delivery of a shipment. The decision of the Supreme Court of Louisiana is admittedly at variance with the decisions of other State Courts of last resort as stated in the majority opinion. It is there acknowledged that two of the cases cited by the Railway Company, one from Missouri and one from Texas, might be contrary to the holding of the Louisiana Supreme Court in the instant case. And it is admitted that the facts in these two cases relied on by the Railway Company were similar to those in the present suit (R. 27). This apparent conflict in jurisprudence can only be satisfactorily and finally settled by a decision of the Supreme Court of the United States.

In addition petitioner urges that the Supreme Court of Louisiana has erroneously interpreted the bill of lading by placing a wrong construction on the language therein and extending the liability of the carrier beyond the terms of the contract.

Petitioner contends further that the Supreme Court of Louisiana has incorrectly interpreted the proceedings of the Interstate Commerce Commission with reference to the adoption of uniform bills of lading and has drawn therefrom conclusions that are not justified by the reports of that body.

Petitioner annexes hereto and files herewith a brief in support of this application wherein the errors of the Supreme Court of Louisiana are set forth in more detail and the reasons why this Court should grant a writ of certiorari are amplified.

Wherefore Petitioner Prays that this petition be granted and that a writ of certiorari be issued out of and under the seal of this Court to the Supreme Court of the State of Louisiana in the cause entitled, "Red River Cotton Oil Com-

pany et al. v. Texas and Pacific Railway Company", No 39,205 on the docket of that Court, for the purpose of reviewing the questions hereinabove specified to the end that the judgment of the Supreme Court of Louisiana may be reversed by this Honorable Court and a decree entered herein for petitioner, Texas and Pacific Railway Company.

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Petitioner,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Supreme Court of Louisiana is officially reported under the style of *Red River Cotton Oil Co. et al.* v. *Texas & P. Ry. Co.*, 44 So. 2d 101 (advance sheet March 9, 1950).

Jurisdiction; Statement of the Case; Specifications of Error

Statements as to Jurisdiction, Statement of the Case and Specifications of Error are set out in the petition. For the sake of brevity they are not here repeated.

Summary of Argument

I. THE DECISION OF THE LOUISIANA SUPREME COURT HOLDING THAT THE CASE OF MICHIGAN CENTRAL RAILWAY COMPANY v. MARK OWEN IS CONTROLLING HERE IS ERRONEOUS BECAUSE THE FACTS IN THE TWO CASES ARE DIFFERENT

(a) In the Michigan Central case there had been no completion of delivery to the consignee and the shipment was still in possession of the railroad company on its public team track to which the public had access.

(b) In the present case the shipment had been finally delivered to and accepted by the consignee who took exclusive possession and control of it and placed it on its private premises under lock and key away from public access.

II. THE DECISION OF THE LOUISIANA SUPREME COURT IS ERRONEOUS IN THAT IT FAILS TO APPLY THE DOCTRINES OF THE COMMON LAW WITH RESPECT TO TERMINATION OF THE CARRIER'S LIABILITY

(a) The bill of lading makes the carrier liable as at common law for any loss or damage to property entrusted to it for transportation.

(b) Under the common law a carrier's liability ends upon completion of delivery and release of possession of the shipment to the consignee.

III. The Louisiana Supreme Court Erroneously Interpreted the Bill of Lading By Holding That a Carrier is Liable As An Insurer as Long as the Free Time for Unloading Has Not Expired

(a) There is no provision in the bill of lading which declares that the carrier is liable as an insurer for any length of time.

IV. The Louisiana Supreme Court Drew Erroneous Conclusions from the Reports of the Interstate Commerce Commission in Connection With the Adoption of the Uniform Bill of Lading

(a) The Court failed to give effect to the ruling of the Commission that it would not impose terms and conditions in bills of lading contrary to the common law.

(b) The Court failed to give effect to the ruling of the Commission that the carrier is liable as such only while the goods are in its custody and prior to delivery to the consignee.

(c) The Court erred in failing to give effect to the ruling of the Commission on the question of possession as a factor in fixing the carrier's liability.

(d) The Court erred in declaring that the clause dealing with the carrier's liability as a warehouseman was intended to fix the time in which the carrier's liability as an insurer ended. The Reports of the Interstate Commerce Commission contain no such declaration.

Argument

As pointed out in the petition above both the Trial Court and the Supreme Court of Louisiana felt constrained to

render a decision in favor of the plaintiff because of the opinion of the Supreme Court of the United States in *Michigan Central Railway Company* v. *Mark Owen,* 256 U. S. 427, 65 L. Ed. 1032. For example, the Trial Judge made the following statement in his written opinion:

> "The Michigan Central case seems to be on all fours with the present case. . . . The Supreme Court held the Railroad Company liable as a common carrier up until the expiration of the free time for unloading. . . . As harsh as this rule of law may be regarding the responsibility of the railroad it seems to have been definitely fixed in this opinion." (R. 15)

The Supreme Court of Louisiana made the following statement in its written opinion:

> "We are of the opinion that this case is controlled by the case of Michigan Central Railroad Company v. Mark Owen and Company, 256 U. S. 427, 65 L. Ed. 1032, in which the Supreme Court of the United States held the carrier liable for the loss of goods under similar circumstances when shipped under a similar bill of lading." (R. 23)

In denying a rehearing to the Railway Company the Supreme Court of Louisiana said in its per curiam opinion:

> "We adhere to our original opinion that the Michigan Central case is controlling here." (R. 33)

At the outset, therefore, it is important to determine whether the decision of the Supreme Court of the United States in the Michigan Central case is controlling and decisive of the issues presented here. Petitioner contends that it is not, and that the distinction between the facts in the two cases is readily discernible. We therefore discuss the *Michigan Central* case as its applicability would seem to be the first and most important question for decision by this Court.

Analysis of Michigan Central Railway Company v. Mark Owen

This case came before the Supreme Court of the United States on a writ of certiorari to the Supreme Court of Illinois. The decision of the State Court is reported in 125 N. E. 767. The facts were that four carloads of grapes were shipped from various points to Chicago arriving at destination on different dates. The cars were placed on the public team track of the Railroad Company and the consignee began unloading the shipment. Before the unloading was completed 126 baskets of grapes disappeared and were apparently stolen from the cars. The Supreme Court of the United States held the Railroad Company liable for the value of the grapes on the theory that there had been no delivery of the shipment to the consignee and that the property was still in the custody of the Railroad Company at the time it was stolen. The Railroad Company took the position that the grapes had been delivered and that its responsibility as a carrier had ceased.

The Supreme Court of the United States disposed of the carrier's contention in the following language:

> "The property here *was not delivered;* access was only given to it that it might be removed and 48 hours were given for the purpose. Pending that time it was *within the custody* of the Railroad Company, the Company having the same relation to it that the Company acquired by its receipt and had during its transportation." (65 L. Ed. p. 1035, Emphasis Supplied.)

The difference between the *Michigan Central* case and the present one is quite clear. In the suit now under consideration there was a complete delivery to the consignee and the shipment was no longer in the custody of the Railroad Company. The cars of copra were not set on fire while

on any public track of the carrier. On the contrary there had been a complete release of the property by the Texas and Pacific Railway Company and a complete surrender of its custody to the consignee. The property was destroyed by fire that originated on the Oil Company's premises in one of its warehouses due to some of its own operations and totally disconnected with the transportation. In the *Michigan Central* case the Court was dealing with a loss that occurred before completion of delivery while the grapes were still in the custody of the carrier.

In the *Michigan Central* case the public had access to the cars. In the present case they were on the private grounds of the Oil Company to which the public had no access and which were fenced with a gate that was locked to keep the public out. In the *Michigan Central* case the cause and origin of the loss were not explained and it was never known how it happened, but in the present case the evidence shows that the fire originated in a warehouse of the Oil Company 18 hours after the carrier had completely surrendered all custody of the shipment and that the flames spread to the cars of copra hours after they had been spotted and accepted by the consignee at the usual place of delivery.

Justice Hamiter of the Louisiana Supreme Court in his dissenting opinion said this:

> "The case of Michigan Central Railroad Company *v.* Mark Owen and Company, 256 U. S. 427, 65 L. Ed. 1032, which the majority holds to be controlling of this litigation, is readily and easily distinguishable in that therein the goods were stolen *prior to their delivery* . . .
>
> "The cars containing the goods in the Michigan case, the opinion therein further shows, were located on a public delivery track of the railroad company; hence, they were available to the carrier for inspection and even removal if and when it saw fit. The same

cannot be said about the cars of copra in the instant case, which, at the time of their loss, *were under lock and key and exclusively controlled by plaintiff.*" (R. 29, Emphasis Supplied.)

The Supreme Court of Louisiana endeavored to avoid this distinction by saying that "although the Supreme Court (of the United States) did say in the opinion that the shipment had not been delivered, we do not believe that this statement formed the point upon which the decision turned." (R. 24). Why did the Supreme Court of the United States find it necessary to answer the contention made by the Railroad Company as to delivery and why did the Court point out that the property had not been delivered but was still in the custody of the Railroad Company unless these facts were considered essential to a determination of the carrier's liability? Is it logical to assume that the Supreme Court of the United States indulged in meaningless language and took the trouble to answer a contention made by the carriers that did not have anything to do with the decision of the case?

There is a difference between the status of goods that are on a public team track and goods that are within a private fenced and locked enclosure. The grapes in the *Michigan Central* case were in a car on a public delivery track to which everybody had access. When the consignee left the premises and the grapes were stolen the car was still on property of the Railroad Company and was still in its custody and under its control. But in the instant case the cars of copra were inside the premises of the Oil Company under lock and key and were put there at the direction of the consignee and were destroyed by fire originating on the premises of the consignee resulting from the activitites of the consignee. Should the carrier be liable for the loss under these circumstances? If this be the principle of law established in the *Michigan Central*

case, then it is indeed a harsh rule. We hope and we believe that this Court will readily distinguish the case at bar from the *Michigan Central* case.

The Termination of a Carrier's Liability under the Common Law

The bill of lading declares that the carrier shall be liable as at common law for any loss of or damage to property received for transportation except such as is caused by act of God, the public enemy, etc. (Appendix A). Nowhere does the bill of lading make the carrier liable as an insurer. This liability arises only because of the principles of the common law applicable to carriers, and therefore, it necessarily follows that the Court can not hold the carrier liable as an insurer except to the extent that this liability is fixed by the common law. It is, therefore, important to determine the rule of liability fixed by the common law.

The doctrine of a carrier's liability as an insurer had its origin many years ago and the reason for the rule was stated by Lord Holt in the celebrated case of *Coggs* v. *Bernard,* 1 Smith's Leading Cases 369, where the author of the opinion says: "the law charges this person (the carrier) thus intrusted to carry goods, against all events but acts of God and the enemies of the King."

The tremendous increase of business operations since those early days justifies the grounds for upholding the early doctrine of liability. Goods are transported over long distances during which they are in the exclusive possession of the carrier. The owner who might seek to recover for loss or damage to his goods would, under these conditions have an impossible task to perform if he had to show the cause. The carrier's exclusive possession of evidence, the difficulties under which the owner would have to labor in discovering and proving the fault of the carrier, his inability to contradict the carrier's witnesses and the

impossibility of investigating all of the facts and circumstances that would have to be unraveled, form the basis for the acceptance of the rule at the present time.

But the time when this liability ceases is expressed in the early American case of *Arthur* v. *St. Paul & D. Railway Company,* 35 N. W. 718 (Minn. 1887), where the Court said:

> A general answer to the question, when does this liability terminate is obvious, viz; Whenever the care and custody of the property has passed from the carrier to the owner, or some bailee of his own choosing, or whenever the owner has, after its arrival at its destination, had a reasonable opportunity of taking the property into his own charge . . . So long as the reasons continue the liability should also continue; when they cease it should cease. (p. 721, Emphasis Supplied.)

Referring to the case then before it the Court added:

> "The grain had gone out of the custody of the carrier's servants into that of a public warehouseman, to whom plaintiffs had authorized defendant to deliver it; . . . The delivery of the grain, as a physical act, was completed. The carrier had done the last act with reference to the property itself which his duty required." (p. 722.)

The general rule as to termination of the carrier's liability as such is set out in Volume 9 of *American Jurisprudence* where we find the following:

> "SEC. 667. Commencement and Duration of Liability.—The liability of a common carrier *as an insurer* of the property intrusted to it for transportation is only *incidental to the contract of carriage,* and neither begins earlier nor continues longer than is necessary to secure the faithful and efficient execution of such contract. Such liability endures from the shipment of the goods until their arrival at their destina-

tion, and continues thereafter *until, but only until, the carrier has made an actual delivery of the property,* in good condition, or has done that which may be considered an equivalent to, or a substitute for, such delivery." (Emphasis Supplied).

In *Gus Datillo Fruit Company* v. *Louisville & Nashville R. Co.*, 65 S. W. 2d 683 (Ky. App. 1933), involving damages to a shipment of bananas, the Court said:

> "But the decisive question herein is whether or not the railway company *retained the possession* of the bananas or whether they were in the possession of appellant during the time between his acceptance thereof and the time of removal by him, during which time the damages complained of occurred." (p. 684, Emphasis Supplied.)

In *Ward* v. *Pere Marquette Ry. Co.*, 204 N. W. 120 (Mich. 1925), the Court held:

> "On the question of delivery the controlling facts in this case are that the carrier placed the car of lumber on a private siding owned and exclusively used by the Taunton Lumber Company, that this siding was the usual and customary place where the shipments were delivered to the lumber company, that the railroad company *relinquished all dominion over the shipment,* and placed it in the *possession* and in the *exclusive control of* the lumber company, and that while in possession of the lumber company the shipment was injured. These facts constitute a *complete delivery* of the car of lumber to the Taunton Lumber Company, etc." (p. 121, Emphasis Supplied.)

In *Southern Advance Bag & Paper Co.* v. *Terminal R. Ass'n. of St. Louis,* 171 S. W. 2d 107 (Mo. App. 1943), the Court stated:

> "Generally speaking all that is required in order to constitute a valid *final* delivery is that the shipment

be transported to its destination, and be there delivered into the actual or constructive possession of the consignee according to instructions, or local or special customs, if not in contravention of established rules of law." (p. 112, Emphasis Supplied.)

In *Queen Insurance Company* v. *Railway Company,* 290 S. W. 286 (Tex. Civ. App. 1926), the Court said:

"In view of them (the facts) especially those to the effect that Naman and his agent, the Compress Company, had actual notice of the arrival and placement for unloading of the two cars at the standard press at 10:00 A. M. on June 23, and exclusive control of them thereafter until the fire some ten hours later, this Court deems the further and consequential finding that *delivery of them by the carriers had been completed* before that event inevitable; for this reason it is not thought necessary to go into the finely drawn distinctions of counsel with reference to various provisions in the bill of lading." (p. 288, Emphasis Supplied.)

In *Rothchild Bros.* v. *Railway Company,* 123 Pac. 1011 (Wash. 1912), the Court said:

". . . There was not only a surrender of the right of *possession* of the property by the defendant but there was an actual *surrender of the property itself* by the defendant and an actual taking of the property by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to the plaintiff's warehouse. Kenny Company *vs.* Atlantic Railroad, 50 S. E. 132; Whitney Company *vs.* Railroad, 17 S. E. 147; Mill Company *vs.* Railroad, 71 N. W. 255; Vaughan *vs.* Railroad, 61 Atlantic 695." (p. 1013, Emphasis Supplied.)

In *Vaughan* v. *Railroad Company,* 61 Atl. 695 (R.I. 1905), the Court said:

"The carloads of oats and the carloads of bran and gluten were undoubtedly the property of the plaintiff

> and had been delivered to him and passed into his *possession* and *control* at the time of the fire. The liability of the defendant as a carrier as to these cars *was then at an end.*" (p. 696, Emphasis Supplied.)

In *Anchor Mill Company* v. *Railway Company,* 71 N. W. 255 (Iowa 1897), the Court said:

> "What will constitute a delivery must of necessity depend upon circumstances. The Railroad Company in order to deliver this wheat in bulk certainly could not be expected to unload it. All that could be required was that it place the car where it could be safely and conveniently unloaded by the party entitled to it and notify him of its action. When it had done this its duties as a common carrier ended." (p. 256, Emphasis Supplied.)

It is clear that under the common law and the general rule stated in American Jurisprudence the liability of the carrier ends with the delivery of the goods to the consignee and the latter's acceptance thereof by taking full and complete possession to the exclusion of all others.

The Louisiana Supreme Court applied the common law insofar as it holds the carrier to be an insurer but failed to apply the common law where it relieves a carrier from such liability. In the opinion the Court refers to a number of common law decisions and states that "the texts are inapplicable as they all refer to the liability at common law whereas here we are dealing with a contractual obligation." (R. 27). But the contractual obligation referred to is the *bill of lading,* and admittedly there is nothing in it about the *carrier being liable as an insurer.* It is only by adopting common law doctrines that the Court can apply that liability. The Supreme Court of Louisiana did not apply the common law doctrine fixing the termination of the carrier's liability. It is inconsistent to use common law doctrines to support a principle affecting the carrier's

liability and then to reject the common law doctrine where it relieves the carrier from liability. If the common law doctrines are to be applied in one instance they should be applied in both.

The Supreme Court of Louisiana recognized that its opinion is at variance with that of the Missouri Court of Appeals in *Southern Advance Bag and Paper Company* v. *Terminal Assn., supra,* and also that of the Texas Court of Civil Appeals in *Queens Insurance Company* v. *Galveston Railway, supra* (R. 27). We thus have two common law cases where the Court relieved the carrier of liability after delivery, which the Louisiana Supreme Court admits are at variance with its opinion.

The Bill of Lading and the Rulings of the Interstate Commerce Commission With Reference Thereto

The majority opinion of the Louisiana Supreme Court discusses the terms and conditions of the uniform bill of lading and the proceedings of the Interstate Commerce Commission with reference thereto.

We find nothing in those provisions or those discussions which declares that the carrier shall be liable as an insurer during any period of time. Section 1(a) of the bill of lading provides that the carrier or party in possession shall be liable as at common law for any loss or damage to the property except as thereinafter provided. The evident purpose of Section 1(a) is to provide exceptions to the carrier's liability as insurer rather than to increase it beyond the principles of the common law. This is evident since Section 1(b) enumerates the causes which excuse the carrier from liability when it is in possession of the property.

Section 1(b) provides for the carrier's liability in case of loss caused by fire occurring after the expiration of the free time. This section mentions such liability in connection with the following: First, the expiration of free time;

second, notice of arrival of the property at destination; third, placement of the property for delivery at destination or tender of delivery of the property. This verbiage does not mean and was not intended to mean that the relationship of carrier should continue *after delivery* has been made. While the carrier relationship does continue until the expiration of the free time where *tender only* of delivery has been made, there is no language in the bill of lading or in the Reports of the Interstate Commerce Commission that evidences an intention that the carrier relationship should continue until the expiration of the free time where *delivery has in fact been made* as distinguished from *placement* of the property or *tender* of delivery. If it had been intended to hold the carrier liable as an insurer during the free time allowed by the tariffs, *after delivery,* the bill of lading would have said so.

Section 4(a) confirms this interpretation by declaring that "when property has not been removed within the free time allowed by the tariffs after *placement* of the property for delivery at destination has been made" that the property may be kept in the car, depot or other place of delivery of the carrier subject to charges for storage and to the carrier's responsibility as warehouseman. Here again it is clear that the bill of lading is dealing with the situation where the shipment has been placed in its warehouse or left in a car on its public track or is otherwise placed for delivery but not actually delivered to the consignee.

The bill of lading does not say nor does it imply that after notice of the arrival of the property at destination, and after its acceptance by the consignee, and after the latter has taken the control and possession of the property, that the Railway Company is still liable as an insurer. To reach any such conclusion the Court will have to read into the bill of lading a provision that does not appear there.

The bill of lading now in use was approved by the Interstate Commerce Commission after hearing representatives of the carriers and the shippers. The discussion with reference to this is found in Volume 52 of the Interstate Commerce Commission Reports beginning at Page 671. The comment by Commissioner Wooley beginning at Page 676 of the Reports declares that:

> "A common carrier is now regarded as an *insurer* of the goods entrusted to its care and custody *for transportation* and is liable for all loss, damage or injury occurring to the goods while they are *held by it* in its *capacity as a common carrier*, etc." (Emphasis Supplied.)

In the present case the transportation had ended and the goods were not being held by the carrier.

The Report (Page 685) then discusses the jurisdiction of the Interstate Commerce Commission and points out that the liability of common carriers rests upon definite legal principles and that the Commission disclaims authority to impose upon carriers terms and conditions in bills of lading which are contrary to the common law. We quote:

> "The Commission is merely the instrument of the law. Its functions are administrative and quasi-judicial. Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; . . ."

The Commission discusses the reciprocal duties of the carrier and the shipper with respect to the delivery of goods. The Report points out that the circumstances and conditions attending the delivery of freight are such that

it is impossible for the shipper to anticipate the arrival of his goods and be there to receive them. We quote the following:

> "As a practical matter, it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position *to be received by him* and removed. Until they are so placed and tendered for delivery it is obviously impossible for the consignee to receive and remove them and the carrier *can not reasonably be relieved of its common-law liability until it has so placed or tendered the goods for delivery.*" (p. 701 Emphasis Supplied.)

The Interstate Commerce Commission says further:

> "There can be no reasonable division, as between the carrier and the shipper, of the carrier's liability for the goods *while they are in its custody and until it has fulfilled its duty of delivery* or, by reason of the consignee's neglect or failure, has, after reasonable efforts so to do, been unable to make the delivery . . . The consignee is within his legal rights if he avails himself of the full time allowed by the tariffs and the carrier can not be presumed to be released from its liability, as such, *while the goods are continued in its custody* and the shipper, in accordance with privileges specifically accorded under duly published and filed tariffs, incurs no penalties." (pp. 701, 702, Emphasis Supplied.)

The Report discusses the proposal advanced by the carriers that their liability should not begin until cars are attached to trains and that their liability should cease when cars are detached from trains. The shippers objected to this proposal of the carriers. It is pointed out in the Report why merely detaching the cars from the train should not relieve the carrier of liability. They might be detached at night; they might be on the carrier's public track where

they could be moved and shifted about by the railroad's engines. They are, under such circumstances, within the carrier's control, and the owner would frequently be unaware of the time when a car had reached destination, and even after it were detached from the train it might remain in the custody of the carrier on its public tracks, where the public could have access to it.

The question of possession is a determining factor as appears by comments of The Commission in *Irion City Produce Company* v. *Pennsylvania Railroad Company*, 206 I.C.C. 63. On Pages 68 and 69 of this Report we find the following:

> "Defendant's obligation under the contract of transportation, and its *control, custody* and *possession* of the goods in cars on its *team tracks* does not terminate until the freight has been actually unloaded. Neither notice to the consignee, the giving of a receipt by the consignee, payment of freight charges, disturbance of the lading, nor the breaking of seals of the cars will operate to relieve the carrier of responsibility *if the goods still remain in its possession.*" (Emphasis supplied.)

Again we see evidence of the importance placed by the Commission on the question of possession insofar as it affects the liability of the carrier.

We respectfully urge that the Louisiana Supreme Court has reached a conclusion which is not in accord with the thought and purpose of the Interstate Commerce Commission as set forth in its Report (52 I.C.C. 671). The Commission itself said in that Report that it could not impose upon carriers the assumption of any greater liability than the common law imposes upon them. Nevertheless the Louisiana Supreme Court in referring to the bill of lading that was adopted after this hearing said: "In effect it (bill of lading) prescribes a general and *absolute* liability

for loss which of course will remain in force as long as the contract is in force with exceptions thereafter provided." (R. 24). With all respect we deny that either the bill of lading itself or the Interstate Commerce Commission in its rulings intended to fasten a general and *absolute* liability on the carriers. On the contrary the Report of the Interstate Commerce Commission shows that it recognized that it could not properly impose on carriers any terms in a bill of lading which were contrary to the principles of the common law or force upon the carriers any assumption of liability greater than that imposed by the common law. If language means anything, then this Court in its interpretation of bills of lading should take into consideration the liability as fixed by common law decisions.

The Louisiana Supreme Court erred further in its conclusion regarding the hearings before the Interstate Commerce Commission with respect to the carrier's liability as an insurer. The majority opinion says that:

> "It is not suggested by the defendant that the railroads did not intend to charge demurrage fees if the cars were under the control of the consignee at the expiration of the free time. This clause would certainly apply regardless of custody and control and the liability as warehouseman would certainly attach. We think that if, as obviously the case, it is intended that the contract should remain in effect until the demurrage charges become operative then the general liability prescribed in the first clause of the contract must remain in effect unless lifted by some specific provisions of the contract. This view is further borne out by the carrier's efforts to introduce a clause which would terminate their liability for shipments placed for delivery on private spur tracks at the time when the cars were uncoupled." (R. 25.)

We respectfully submit that the Court misunderstood the meaning of Section 4(a) of the bill of lading. The charge for demurrage is simply a charge for the continued use of cars by the consignee after a certain limited time. There is nothing in the charge for demurrage which fixes the liability of the carrier as an insurer. The purpose of this provision was to prevent cars being tied up indefinitely by consignees and used as storage places by them to the prejudice of the public interest.

The Louisiana Supreme Court also erred in stating that the Court's view is borne out by the carrier's efforts "to introduce a clause which would terminate their liability for shipments placed for delivery on private spur tracks at the time when the cars were uncoupled." The Court has failed to consider the entire discussion of this subject. Here is what the carriers proposed under Section 4 of the bill of lading:

> "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloading from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered on private or other sidings or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains or until loaded into and after unloaded from vessels." (52 I.C.C. 714.)

The Interstate Commerce Commission refused to adopt the provision offered by the carrier and in doing so said:

> "So, in respect of shipments transported by a carrier for delivery to a consignee at destination, the proposal would terminate the carrier's liability, as such, even more abruptly and under even less justifiable circumstances than were discussed in a prior part of this report, in connection with the proposal in Clause 4 of Section 1, to limit the carrier's liability to that of ware-

houseman after 48 hours after notice of arrival of the property at destination had been duly sent or given. We say more abruptly because, under the proposal we are here considering, the carrier's liability would apparently be terminated as soon as a shipment has arrived and been set out of the train in the yards at the destination terminal—even before the giving of notice to the consignee." (52 I.C.C. 716.)

If such provision had been adopted the carrier would have been relieved of all liability as soon as a car was detached from the train. In many cases this would mean that the carrier would be free of liability even though the consignee had no notice of the arrival of the shipment, and even though the carrier still had control over the shipment and could move it about or otherwise handle it on its own premises. The Commission did not say that the liability of the carrier as an insurer should continue after delivery of the goods to the consignee when the latter takes full custody and control thereof to such an extent that the carrier no longer has any jurisdiction or authority over the goods whatever, and no access to them. It is not logical to say that a rejection of the carrier's proposal that its liability should cease as soon as a car is detached from the train, means that its liability as an insurer would continue after a car had not only been detached from the train but had been surrendered to the consignee and placed on his private premises under lock and under the consignee's complete dominion as in the present case.

Justice Hamiter in his dissenting opinion comments upon this provision in the bill of lading in the following language:

"The majority opinion holds the defendant responsible on the theory that the bills of lading (admittedly contracts between the parties) render the carrier liable as an insurer when, as in this case, the fire occurs during the stipulated free time for unloading. But those bills of lading, I maintain, are inapplicable here. They,

with reference to the contracted liability during free time, *pre-suppose possession, custody and control* of the goods by the carrier at the time of the loss; that which, as above shown, this defendant did not enjoy." (R. 29.)

Conclusion

The questions involved are of great public importance affecting proper interpretation of the uniform domestic bill of lading covering interstate shipments and the extent of the liability of common carriers in such commerce. The conclusion reached by the Louisiana Supreme Court appears to be in conflict with the decisions rendered by the Courts in other states, and this variance should be settled finally by a decision of this Court. A Federal question of substance is involved which we contend has not heretofore been determined by this Court and has been decided by the State Court in a way that is erroneous. It is therefore respectfully submitted that the petition for the writ of certiorari be granted.

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APPENDIX "A"

CONTRACT TERMS AND CONDITIONS CONTAINED IN BILL OF LADING

"Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time, allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes."

* * * * * * *

"Sec. 4 (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for

delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 729

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,

versus

RED RIVER COTTON OIL COMPANY, ET AL.,
Respondents.

BRIEF FILED ON BEHALF OF RESPONDENTS IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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STATEMENT OF THE CASE.

This suit was filed against the Texas & Pacific Railway Company to recover the sum of $31,573.08, the value of four cars of copra destroyed by fire on February 10, 1947.

The shipment of copra, of which these four cars were a part, originated in the Philippine Islands, moved from there by steamship to New Orleans, La., and by de-

fendant railroad from New Orleans to Alexandria, La., under four bills of lading, which are attached to the petition. (Exhibit A, Record, pages 10A-10B).

Plaintiffs allege that on Sunday, February 9, 1947, about 9:30 A. M., the cars were placed or spotted by the defendant on a spur track adjacent to the oil mill; that due to the fact that Sunday was a holiday for the mill's operating and unloading crews, it was impossible for it to open the cars, inspect the contents, and unload them before the next working day. It is alleged that at 3:50 A. M., Monday, February 10th, before the seals on the cars had been broken, and before the free time for unloading had elapsed, the four cars of copra were destroyed by a fire which originated on the oil mill premises from some unknown cause.

The four cars which were burned in the fire contained 132.66 tons of copra valued in Alexandria at $238.00 per ton, or a total of $31,573.08, the amount for which suit was filed.

Plaintiffs' cause of action arises under the contract of transportation, that is, the bill of lading which provides, in effect, that if goods, entrusted to the care of a railroad, are destroyed other than by an Act of God, etc., before the free time for unloading has expired, the carrier is liable for their value as at common law.

Applying this rule to the case at bar, we alleged that because the four cars of copra were destroyed by a fire of unknown origin, after the cars had been spotted on a spur track adjacent to the plant of the oil mill, but before the free time for unloading had expired, the railroad is liable

as an insurer, for the full value of the copra entrusted to its care.

The railroad's main defense, as set out in its answer, is that the four cars of copra had been delivered, thus ending its liability as a carrier, or otherwise.

The trial judge held that plaintiffs were entitled to recover the amount claimed. He rendered a written opinion giving reasons for his judgment. (Record, pg. 11).

The Supreme Court of Louisiana affirmed this judgment, (Record, pg. 21), and later denied an application for a rehearing. It rendered a short per curiam in which it briefly, but clearly, restated the reasons for its judgment. (Record, pg. 32).

The defendant, petitioner herein, has applied to this court for a writ of certiorari to the Supreme Court of the State of Louisiana. The purpose of this brief is to oppose the application.

JURISDICTION.

We do not contend that this court may not grant petitioner's application. We concede that you may, but, at the same time urge that this is not a case in which you should grant this extraordinary writ.

At this point we quote from your rules as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither

controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Rule 38).

The federal question presented in this case has been determined by this court. (*Michigan Central Railroad Co. v. Owen & Co.*, 256 U. S. 427, 65 L. Ed. 1032).

The Supreme Court of the State of Louisiana followed this decision. It cited the case in support of its judgment. (See original opinion, Record, pg. 21, and *per curiam*, Record, pg. 32).

In view of the fact that the Supreme Court of Louisiana based its decision upon a prior decision of this court, following it in letter and in spirit, we urge that this is not a proper case for the granting of a writ of certiorari.

THE QUESTION PRESENTED.

The sole and only question presented in this case is a determination of the liability of a common carrier, under a bill of lading, for goods in a car which had been spotted on a spur track, but which were destroyed by fire of unknown origin before unloading had begun, and before the expiration of the free time for unloading.

This was the sole and only question presented in the *Michigan Central-Owen* case, *supra*, in which this court

held the railroad's liability to be that of a carrier at common law. The rule there announced is decisive, we submit, of the issue now before you.

THE MICHIGAN CENTRAL-OWEN CASE.

We now come to a discussion of the all-important *Michigan Central* case which, we submit, is decisive of the issue here presented. In that case, plaintiff sought to recover the value of a part of a shipment of grapes which was destroyed by fire while still in the railroad car after arrival at its destination. The railroad had spotted the car on a public delivery track for unloading, and had given notice of its arrival, and consignee had accepted the car, had broken the seals and began unloading the grapes. The fire occurred after the car had been practically unloaded, but before the expiration of the 48 hours free time provided in the bill of lading.

The court's statement of the facts, of the issue presented to it, and its quotation from the bill of lading are as follows:

> "Upon arrival of each car it was placed on a public delivery track of the railroad company and notice thereof given. Respondent accepted each car, breaking the seals thereof. And it is stipulated that at the time respondent started to unload, each of the cars contained the number of baskets and pounds of grapes received for transportation. The loss, whatever there was, occurred after the acceptance of the cars and their unloading had commenced, and whether the railroad company is liable therefor, and in what capacity liable,—whether as

carrier or warehouseman, or at all,—is the question in the case.

"The answer depends upon the construction to be given to the first paragraph of section 5 of the bill of lading. It is as follows:

" 'Property not removed by the party entitled to receive it, within forty-eight hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage'."

The court then stated that the difference between plaintiff and defendant was the relation of the carrier to the shipment within the 48 hours after notice of its arrival had been given, and before the expiration of that 48 hour period. The contentions made by the parties according to the opinion were as follows:

"That of respondent is that the railroad company, during the forty-eight hours, is responsible as a carrier, this relation not terminating until the expiration of that time. The contention of the railroad company is contra, and that it, the company, is neither liable as a carrier or warehouse-

man. Not as a carrier, because the shipment had been delivered and accepted; not as warehouseman, because no negligence has been proved against it."

Your Honors will note that the position taken by the defendant in the *Michigan Central* case is just exactly that contended for by the defendant now before you. The Texas & Pacific Railroad Company contends here that it is not liable as a carrier, because the shipment had been delivered and accepted and that, as a carrier, it had done all that it was required to do according to usage and custom, and that it had complied with all of its obligations and duties as a carrier.

The Supreme Court of the United States made very short work of the legal theory advanced by the defendant carrier, stating in no uncertain terms that during the free time accorded the plaintiff for unloading, the responsibility of the railroad under the bill of lading was that of a carrier as at common law. The pertinent portion of the opinion is as follows:

"By referring to section 5 of the bill of lading, it will be seen that it supposes a contingency and provides for its occurrence. It supposes that property may not be removed when it has reached destination, and is available for delivery, and two periods of time are provided for. One of forty-eight hours after notice of the arrival of the property has been sent or given. During this time there is no declaration of the relation of the railroad company to the property. The other period commenced at the expiration of the first or forty-eight

hour period, during which the provision is that the property is subject 'to carrier's responsibility as warehouseman only.' The comparison has its significance and must be accounted for. Realizing this, the railroad company makes a distinction. Its contention is that where delivery has been made of the property, as, it insists, was true in the case at bar, the responsibility of the railroad company as carrier immediately ceases. If, however, it is neither delivered nor removed within forty-eight hours after notice of its arrival, the responsibility of the railroad company thereafter is that of 'warehouseman only'.

"The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here was not delivered; access was only given to it that it might be removed, and forty-eight hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

"The bill of lading is definite, as we have pointed out, in its provisions and of the time at which responsibility of the company shall be that of warehouseman, and, by necessary implication, therefore, until that responsibility attaches, that of carrier exists."

It is obvious that the case at bar is much stronger for plaintiffs than the *Michigan Central* case. In our

case, the cars were spotted on a spur track on Sunday when our plant was not operating, and so the seals on the cars had never been broken when the fire occurred. In the *Michigan Central* case, the car had been accepted and had been partially unloaded before the remaining grapes were destroyed by fire. Despite all of this, the Supreme Court of the United States held that so long as the 48 hours free time for unloading had not elapsed, the railroad was liable as a carrier, and not as a warehouseman.

We earnestly submit to Your Honors that the rule of law laid down in this case back in 1921, is still the law of the land and that it is applicable to the case before you. The four cars of copra had been placed on a spur track adjacent to plaintiff's plant, but no attempt had been made to unload them, and the 72 hours free time afforded the oil mill for unloading had not elapsed.

We may say in passing that in our case, plaintiff alleged, and defendant admitted, that the free time for unloading fixed in the tariffs was 72 hours (Pet. and Ans., Par. 7). So, of course, the copra was destroyed before the expiration of the free time, and at a time when the responsibility of the railroad was that of a carrier as at common law, or, practically that of an insurer.

While arguing the exception of no right or cause of action in the lower court, counsel for the railroad attempted to differentiate the *Michigan Central* case simply by saying that the bills of lading in the two cases were different. So that the court may see how remarkably similar the bills of lading really are, and particularly that portion of the bill of lading in the *Michigan Central* case

quoted in the opinion, and which the court used as the basis of its decision fixing the liability of the railroad as a carrier, we quote side by side the first paragraph of Sec. 5 of the bill in the *Michigan Central* case, and the first paragraph of Sec. 4 of one of the bills of lading in our case:

Paragraph (a) of Sec. 5 of the Bill of Lading in the *Michigan Central* case:	Paragraph (a) of Sec. 4 of the Bill of Lading in the case at bar:
"Property not removed by the party entitled to receive it, within forty-eight hours exclusive of legal holidays, after notice of its arrival has been duly sent or given, may be kept in car, depot, or place of delivery of the carrier subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only."	"Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only."

One can readily see that there is no real difference between Par. (a) of Sec. 4 of the bills of lading in evidence in the case at bar (Plaintiffs' 4, Record, pg. 10A-B), and Par. (a) of Sec. 5 of the bill of lading under which the Supreme Court of the United States held the Michigan Central Railroad Company liable for the value of the grapes which were destroyed by fire that occurred after delivery of the car, but within the 48 hours free time allowed in the bills of lading.

The free time in our case (72 hours) is not fixed in the bill itself, but by tariffs, to which reference is made in the paragraph of the bills of lading above quoted. That, if it please the Court, is the sole difference in the two bills of lading.

Your Honors will quite readily appreciate the purpose and import of the provision in the bills of lading which we have just quoted. It is obvious that it limits the liability of the railroad after the expiration of the free time to that of a warehouseman, something considerably less than the liability of a carrier at common law. Therefore, as the Supreme Court so aptly said in the *Michigan Central* case, liability as a warehouseman does not begin until the expiration of the free time, so necessarily until then, liability as a carrier continues.

The decision in the *Michigan Central* case, we submit, is a complete answer to the defense of "delivery" urged by the Texas & Pacific Railway Company. It is made plain in the majority opinion that responsibility and liability as a carrier as at common law, continues until the expiration of the free time for unloading.

In our case the proof is that, before the expiration of the free time, and while the Texas & Pacific's liability was that of a carrier as at common law, that is, substantially that of an insurer, the four cars of copra were destroyed by fire of unknown origin and cause. Clearly then, we submit, the railroad is liable to plaintiffs for the value of the copra so destroyed.

The so-called "delivery" defense, urged by our opponent, seems to have been taken bodily from the dissenting opinion of Mr. Justice McReynolds in the *Michigan Central* case from which we have quoted. The judge, alone of the nine members of the court, took the position that the railroad was no longer liable, either as a carrier or as a warehouseman, because the carload of grapes:

> "* * * was opened, examined, accepted and apparently thereafter remained in charge of the consignee."

The other members of the court held, however, in no uncertain terms, that despite the fact that the car had been opened and examined and accepted, and despite the fact that the car had been almost entirely unloaded, the railroad was liable as a common carrier for the value of the grapes that remained in the car, because the free time for unloading them had not expired.

We rely upon the majority opinion. The facts in the two cases are almost identical, and the rule of law laid down in one is certainly applicable to the other. We say

that the case amply supports our contention that the defendant in this case is liable as a carrier under the common law, and must pay the value of the copra destroyed by fire.

Counsel argues that the transportation had been completed, that the Texas & Pacific had done everything with the shipment that it had to do, or could do, and that, therefore, it could not be liable for the value of the goods. Counsel fails to appreciate the true relationship between a carrier and a shipper or receiver of goods under the terms of the bill of lading.

The answer to the contention is that the oil mill still had something to do with the copra. To make any use of it, it had to unload it and, as part of the contract of transportation for which it paid a rate, or a premium, if you will, it had seventy-two hours free time to unload the copra. During this free time the railroad was liable to it for the value of the copra as a carrier at common law, thereafter as a warehouseman. So long as the oil mill had something to do with respect to the copra there could be, and was, a responsibility on the part of the defendant. Its responsibility was divided into two kinds. For the first seventy-two hours it was liable as a carrier, and thereafter it was liable as a warehouseman. The bill of lading clearly so provides, and the Supreme Court of the United States so construed a bill of lading that is substantially identical.

May we remind the court that in the case of the grapes, Michigan Central Railroad Co., so far as it was

concerned, had nothing more to do with them. It had spotted the car, the consignee had opened it and accepted the grapes, and had substantially unloaded them. The railroad was entirely through with them. It had nothing whatever further to do. The grapes were in the hands of the consignee, and he was unloading them. The crux of the matter, however, was that the 48 hour free time for unloading hadn't expired, and during that period the grapes were still at the risk of the railroad, and when they were lost the Supreme Court of the United States held them liable for their value. The same rule of law applies with equal force to copra.

Counsel seeks to distinguish our case from the *Michigan Central* one by saying that the grapes had not been delivered, but had remained in the custody of the railroad, while here the copra had been delivered and was in our hands. We feel that he has entirely misconstrued the *Michigan Central* case.

The opinion clearly shows that after the arrival of the cars they were placed on a delivery track of the railroad company, the cars were opened, the grapes were examined, accepted and largely removed. Certainly, all of this amounts to more of a delivery than could be contended for in the case of the copra, which had merely been spotted on a spur track awaiting unloading.

Besides, as Judge McKenna so aptly stated in the majority opinion, the railroad company there, and here,

places too much importance upon the word "delivery". Placing a car on a spur track for unloading is not delivery in the sense that the carrier may no longer be liable for its contents. To absolve a carrier from liability not only must a car be spotted, but the free time for unloading it must also elapse before the railroad's liability is other than that of a carrier at common law.

Authority for our last statement is to be found in the majority opinion in the *Michigan Central* case which we are discussing, in which the organ of the court observed:

> "The answer puts too much emphasis upon the distinction between property removed and property delivered. The property here had not been delivered; access was only given to it that it might be removed and forty-eight hours were given for the purpose. Pending that time, it was in the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

That observation of the factual situation, and legal relationship of the carrier is exactly what we have here. As with the grapes, the copra had not been delivered; it had been placed upon a railroad spur track adjacent to the oil mill's plant in order that it might be unloaded. The free time for unloading had not expired, and until it had, the copra was still the responsibility of the railroad com-

pany, and its relation to the copra was that of a carrier at common law.

The Supreme Court of Louisiana found as a matter of fact that the copra had not been delivered by the carrier to the consignee, but, on the contrary, the cars had merely been placed or spotted for delivery. (See per curiam, Record, pg. 32).

In this per curiam the Supreme Court so aptly stated the whole issue that we cannot refrain from quoting as follows:

> "It is conclusive to us that under this bill of lading, as long as the copra remained in the cars of the railroad, the railroad was to be either a carrier or a warehouseman to the consignee, and, since the free time had not elapsed, it was a carrier under the provisions of the bill of lading. We adhere to our original opinion that the Michigan Central case is controlling here."

The jurisprudence of the State of Louisiana for a period of many years has been in harmony with the rule announced by this court in the *Michigan Central* case. The Supreme Court of Louisiana could have cited decisions of its own in support of its judgment. Though probably not too important at this time, we refer your Honors to some of these decisions:

Rivera v. Texas & N. O. Railway Company, 31 So. (2) 180;

Anderson-Clayton v. Yazoo & M. V. R. Co., 174 La. 762, 141 So. 453;
Noel Bros. v. Texas & Pacific Railway Co., 16 La. App. 622;
DeJean v. Louisiana Western Railway Company, 167 La. 111;
Civil Code, Art. 2457;
Lehman & Stern Co. v. Morgan's L. & T. R. R. & S. S. Co., 115 La. 1, 38 So. 873.

In support of its theory that the four cars of copra had been completely delivered and that it was no longer liable, either as a carrier or as a warehouseman, the defendant cited in the Supreme Court of Louisiana, and in the District Court as well, some cases selected from the different states. We do not wish to discuss them here except to say that in the main they are very old decisions, decided long before the passage of the Carmack Act in 1906, or the amendments to the act.

In the other cases that arose later there was no showing of the provisions of the bill of lading which, of course, fixes and determines the relative rights and obligations of the consignee and of the carrier.

For the moment we think it sufficient to say that the Supreme Court of the State of Louisiana refused to be bound by any of these decisions, but, quite properly, followed the decision of this court in the *Michigan Central* case, in which the facts were largely the same, the bills of lading almost identical, and which, in all respects, was decisive of the issue presented to it.

We respectfully submit to the court that the decision of the Supreme Court of Louisiana correctly construed and followed the decision of this court, and that, therefore, petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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